

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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In the Matter of

Southwestern Bell Telephone Company
Tariff F.C.C. No. 73

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Transmittal Nos. 2433 and 2449

CC Docket No. 95-140

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MFS COMMUNICATIONS COMPANY, INC.
OPPOSITION TO SOUTHWESTERN BELL DIRECT CASE

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SUMMARY

On September 11, 1995, SWBT filed a *Direct Case*¹ in response to the Commission's recent *Designation Order* in CC Docket No. 95-140.² In that *Designation Order*, the Commission, which had suspended SWBT's Transmittals Nos. 2433 and 2449³, directed SWBT to submit additional information regarding the areas of tariff language, pricing flexibility and competitive necessity.⁴

The Commission found that an investigation of SWBT's proposed tariff was warranted, in order to determine whether the language in sections 29.2 and 29.3 of SWBT's tariff is unreasonably vague and ambiguous; whether the tariff is consistent with the Commission's zone density pricing policies; whether the competitive necessity test should be applied to the tariff and, if so, whether the tariff meets all three requirements of the competitive necessity test.⁵

¹ *Southwestern Bell Tel. Co. Tariff F.C.C. No. 73, Direct Case of Southwestern Bell Telephone Company*, CC Docket 95-140 (Sept. 11, 1995) (*Direct Case*).

² *Southwestern Bell Tel. Co. Tariff F.C.C. No. 73, Order Designating Issues for Investigation*, DA 95-1867, CC Docket No. 95-140 (released Aug. 25, 1995) (*Designation Order*).

³ *Southwestern Bell Tel. Co. Tariff F.C.C. No. 73, Order*, DA 95-1445, CC Docket 95-140 (released June 26, 1995) (*Suspension Order*). Through these Transmittals, SWBT is attempting to file a new section to its access tariff which would entitle SWBT to provide ICB (individual case basis) pricing in response to RFPs (requests for proposals) from customers.

⁴ *Designation Order* ¶¶ 7, 11, 15.

⁵ *Id.* ¶¶ 6, 10 and 14.

In its *Direct Case*, SWBT asserts that it has adequately addressed the Commission's information requirements and that the suspension on its Transmittals should be immediately lifted.⁶ However, as MFS discusses herein, SWBT has done little to clarify the vague and ambiguous language of its tariff, or to justify receiving additional pricing flexibility in violation of the Commission's zone density pricing and volume and term discount pricing. Additionally, SWBT has provided the Commission with virtually no information as to why the Commission should apply the competitive necessity test or why SWBT satisfies the criteria of this test.

Permitting SWBT to offer ICB pricing in response to RFPs will not result in providing any increased benefits to the vast majority of customers in SWBT's service areas. Further, allowing the dominant and frequently only service provider in a given area to price on an ICB basis in response to RFPs will only serve to reduce the likelihood of competitive alternatives for the consumer, even in areas in which limited amounts of competition currently exist. For these reasons, SWBT's Transmittals Nos. 2433 and 2499 merit summary denial.

⁶ *Direct Case* at 1.

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**MFS COMMUNICATIONS COMPANY, INC.
OPPOSITION TO SOUTHWESTERN BELL DIRECT CASE**

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, and pursuant to the Commission's *Designation Order*¹ hereby respectfully submits its opposition to the Direct Case filed by Southwestern Bell Telephone Company ("SWBT") in the above-captioned docketed proceeding.

I. INTRODUCTION

Through its Transmittals Nos. 2433 and 2499, SWBT attempts to provide individual case basis ("ICB") pricing to selected customers in response to requests for proposals ("RFPs") submitted to SWBT by these customers. The Commission has defined ICB pricing as a term usually used "when a carrier adopts a practice of

¹ *Southwestern Bell Tel. Co. Tariff F.C.C. No. 73, Order Designating Issues for Investigation*, DA 95-1867, CC Docket No. 95-140 (released Aug. 25, 1995) (*Designation Order*).

developing a price for a particular service or facility in response to each customer request for the service or facility."²

As MFS discusses herein, the SWBT proposal merits rejection for the following reasons: first, the language in its tariff is impermissibly vague and ambiguous; second, the levels of pricing flexibility that SWBT attempts to engage in have been determined by the Commission to be inappropriate; third, SWBT has failed to demonstrate competitive necessity or to identify public policy concerns that would justify its proposed pricing standard.

The Commission repeatedly has rejected similar ICB pricing tariffs from SWBT in the past,³ yet SWBT continues to assert many of the same arguments here that the Commission has already dismissed. As MFS dicusses below, SWBT has failed to provide any reason why the Commission should depart from its prior findings in the instant case.

² *Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, 4 FCC Rcd 8634 (1989) (DS3 ICB Order).

³ See, e.g., *Southwestern Bell Communications, Inc. Revisions to Tariff* F.C.C. No. 73, DA 95-1847 (released Aug. 22, 1995); *Southwestern Bell Tel. Co. Revisions to F.C.C. No. 73*, 9 FCC Rcd 1616 (1994); *Southwestern Bell Tel. Co. Revisions to Tariff F.C.C. No. 73*, 9 FCC Rcd 2683 (1994).

II. SWBT'S TARIFF CONTAINS LANGUAGE THAT IS VAGUE AND AMBIGUOUS.

SWBT has failed to adequately clarify its language in Section 29 of its tariff. SWBT's proposal is impermissibly vague in violation of Sections 61.2 and 61.54(j) of the Commission's Rules. Sections 61.2 and 61.54(j) require the LECs' tariffs to clearly and definitively state the general rules, regulations, exceptions and conditions that govern their rates.⁴

SWBT fails to set forth any standards with which to determine what constitutes a "competitive bidding situation."⁵ Instead, SWBT asserts that there is no need to create standards for a competitive bid situation because the bidding process "is already in place and is recognized and used industry wide."⁶ As a result, simply because a customer sends out an RFP to SWBT, SWBT will assume that a bid from at least one competitor exists and that the customer has a choice--an assumption that forms the basis for SWBT's definition of "competitive situation."⁷

While SWBT intends to clarify the language in Section 29.2 of its tariff to make certain that customers understand "competitive situation" to mean that multiple vendors

⁴ See 47 C.F.R. §§ 61.2, 61.54(j) (1994).

⁵ SWBT *Direct Case* at 5.

⁶ *Id.*

⁷ *Id.* at 7-8.

have been invited to bid,⁸ such language remains unreasonably vague and, perhaps more importantly, impractical, because SWBT's proposal provides no other means of verifying the existence of another competitor, other than relying on the customer's issuance of an RFP. SWBT has completely avoided the Commission's question as to how it will determine what constitutes a *bona fide* RFP, stating only that it "will examine RFPs on their face" to determine whether they meet the "competitive situation" criteria⁹ (which, in essence, amounts to whether the customer has stated in the RFP that another competitor exists.)

The policy of ICB pricing for RFPs advanced by SWBT thus is both impracticable and unenforceable because SWBT is unable to prove that the RFPs it issues on an ICB pricing basis are *bona fide* RFPs. SWBT has provided no information by which the Commission or other interested parties can determine whether an RFP is in fact *bona fide*, or is simply a *sham*. Because the SWBT proposal provides no way of determining what would constitute a bona fide request, there would be no way of protecting either competitors or the public from unreasonably discriminatory, predatory, or otherwise anticompetitive rates established in response to sham RFPs. Because SWBT's proposed revisions are unenforceable, the tariff is impermissibly vague in violation of the Commission's rules.

⁸ *Id.* at 8-9.

⁹ *Id.*

Additionally, SWBT fails to define the types of access services that will be available under its proposed RFP tariff in the future, although SWBT does state that the access services currently available are limited to those specified in SWBT's Transmittal No. 2433.¹⁰ Finally, SWBT fails to identify any restrictions on the general availability of discounted services to be offered by SWBT, stating that such restrictions "will depend upon the services requested by customers."¹¹ This failure to define services subject to ICB pricing flexibility also renders SWBT's tariff language impermissibly vague.

Because SWBT's proposed tariff language remains vague and ambiguous, it is violative of the Commission's rules and so must be rejected.

III. SWBT HAS UNLAWFULLY DEVIATED FROM COMMISSION'S RULES REGARDING PRICING FLEXIBILITY.

The Commission's rules on zone density pricing and volume and term discount policies permit the LECs a substantial amount of pricing flexibility. However, the

¹⁰ SWBT *Direct Case* at 9.

¹¹ *Id.*

Commission clearly has determined that the flexibility the LECs currently enjoy is adequate to meet competition and that providing them with any additional pricing flexibility is unnecessary at this time.¹²

SWBT's proposal for ICB pricing in response to RFPs is merely its most recent attempt to obtain additional pricing flexibility that has not been approved by the Commission. SWBT's previous arguments for permitting it to engage in ICB pricing have been soundly rejected by the Commission in no less than three orders over the past year.¹³ The Commission rejected two of those orders based upon the following findings: unclear and ambiguous tariff language; SWBT's failure to cite any Commission precedent with which to justify permitting the tariffing flexibility enjoyed by nondominant carriers; and SWBT's insufficient constitutional challenge to the dominant/nondominant regulatory classification of communications carriers.¹⁴ SWBT's third transmittal was

¹² See *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC RCD 7374, 7377-78, 7422-25 (1993) (granting LECs additional pricing flexibility in the form of density zone pricing and volume and term discounts to permit the LECs the ability to respond to competition.)

¹³ See, e.g., *Southwestern Bell Communications, Inc. Revisions to Tariff F.C.C. No. 73*, DA 95-1847; *Southwestern Bell Tel. Co. Revisions to F.C.C. No. 73*, 9 FCC Rcd 1616; *Southwestern Bell Tel. Co. Revisions to Tariff F.C.C. No. 73*, 9 FCC Rcd 2683..

¹⁴ *Southwestern Bell Tel. Co. Revisions to Tariff F.C.C. No. 73*, 9 FCC Rcd at 1617; *Southwestern Bell Tel. Co. Revisions to Tariff F.C.C. No. 73*, 9 FCC Rcd at 2686.

rejected by the Commission because the proposed one-time extension of ICB pricing for Vintage service customers was found to be unreasonably discriminatory.¹⁵

SWBT's latest request is for ICB pricing in the context of RFPs, but SWBT's arguments remain as flawed and unpersuasive as ever. SWBT's attempt to justify its ICB pricing in response to RFPs is unreasonable and has no basis in fact. SWBT asserts that its proposed tariff does not contravene the Commission's policies regarding LEC pricing flexibility because "broader pricing and rate structure flexibility" is justified in the face of developing competition.¹⁶ SWBT, however, makes no attempt to show that the level of competition that it currently faces has grown substantially since the Commission rejected its previous efforts to obtain ICB pricing flexibility, and in fact, no such showing is possible. More importantly, however, SWBT has failed to demonstrate that its attempt to provide ICB pricing in response to RFPs is in the public interest. In fact, not only is SWBT's proposal not in the public interest, it actually will *harm* the public because fewer, if any, new competitive entrants will find attractive those service areas in which SWBT has selectively succeeded in selectively lowering prices through ICB offerings.

SWBT claims that the very existence of the RFP establishes competition sufficient to justify additional pricing flexibility because the RFP may be the only warning

¹⁵ *Southwestern Bell Communications, Inc.*, DA 95-1847 ¶¶ 5, 10-11.

¹⁶ *SWBT Direct Case* at 11.

SWBT receives that it is about to lose a customer's business.¹⁷ For this reason, SWBT maintains that "to deny SWBT the ability to respond to a competitive bid situation is tantamount to the Commission awarding the business to one of SWBT's competitors."¹⁸

In actuality, these claims are little more than an attempt by SWBT to use the word "competition" to justify impermissible offerings of discounted service outside of the areas where the Commission has permitted pricing flexibility. In the *DS3 ICB Order*, the Commission considered and rejected LEC requests for ICB rates for DS3 and DS3 equivalent services.¹⁹ The *ICB Order* restricts LECs from engaging in precisely the type of unreasonably discriminatory ICB pricing that SWBT attempts to establish through Transmittal No. 2433 and 2449. This decision has been reiterated in Commission orders consistently, including the three orders rejecting SWB pricing flexibility that were released over the last 18 months.

The Commission's decisions in the area of LEC ICB pricing practices are clear. Because SWBT's proposal is inconsistent with those decisions regarding LEC pricing flexibility, SWBT's proposed tariff must be rejected.

¹⁷ SWBT *Direct Case* at 14 n.12.

¹⁸ SWBT *Direct Case* at 14.

¹⁹ *DS3 ICB Order*, 4 FCC Rcd 8634.

IV. SWBT HAS FAILED TO MAKE THE EVIDENTIARY SHOWING REQUIRED IN THE FCC'S DESIGNATION ORDER REGARDING THE TEST OF COMPETITIVE NECESSITY.

The competitive necessity test, as set forth by the Commission in the *Private Guidelines Order* and as cited by the Commission in its *Designation Order*, states that "[a] carrier's proof (of competitive necessity) should include a showing that (1) an equal or lower priced competitive alternative--a similar offering or set of offerings from other common carriers or customer-owned systems--is generally available to customers of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and (3) the volume discount contributes to reasonable rates and efficient services for all users.²⁰ This test has been upheld on appeal by the Second Circuit as consistent with the Interstate Commerce Commission's determination that the competition must be "genuine and not a pretense."²¹

The competitive necessity test is the standard for competition and SWBT has failed to meet it. With respect to the first criterion, SWBT cannot confirm with any certainty the existence of competition from other vendors in a given RFP and thus it

²⁰ *Private Line Rate Structure and Volume Discount Practices*, 97 F.C.C. 2d 923, 948 (1984). See also *Designation Order* ¶ 14 n. 29.

²¹ *American Tel. and Tel. Co. v. Federal Communications Comm'n*, 449 F.2d 439, 450 (2nd Cir. 1971). See also, *Aeronautical Radio, Inc. v. Federal Communications Comm'n*, 642 F.2d. 1221, 1230 (D.C. Cir. 1980), *cert. den.*, 451 U.S. 920 (1981).

cannot prove that there is an equal or lower priced competitive alternative to its services. With respect to the second and the third, SWBT has done nothing to reveal that the terms of its discounted offerings are reasonably designed to meet competition without undue discrimination or that these discounts will contribute to reasonable rates and efficient services for all users, because its tariff language is impermissibly vague as to both the services and the rates SWBT will offer through ICB pricing in response to requests.

SWBT's assertion that it has already demonstrated a showing of competitive necessity in other filings²² is inadequate to meet the evidentiary standards required by the Commission and the courts. As a result, SWBT has provided the Commission with no record in this proceeding upon which to make a determination that the type of pricing flexibility sought by SWBT is reasonable and would result in reasonable rates.²³ Additionally, SWBT's proposal fails to provide adequate assurance that SWBT's response to RFPs truly is "genuine and not a pretense."

²² SWBT *Direct Case* at 15.

²³ Moreover, even if SWBT had shown that it meets the competitive necessity criteria (and MFS reiterates that SWBT clearly has not), the Commission noted in its *Suspension Order* that the *DS3 ICB Order* "does not establish that a showing of competitive necessity will justify the filing of discriminatory rates." *Designation Order*, at para. 14. The policy behind this decision--that permitting such exceptions through ICB rates may be harmful to competition, in addition to containing no guarantee of reasonable rates for customers--was to prevent unlawfully discriminatory and predatory pricing practices. It is precisely these unreasonable pricing practices that would be permitted by SWBT's proposals.

SWBT has failed to justify its proposed pricing scheme under the competitive necessity test. As a result, SWBT's proposed tariff must be rejected.

V. OTHER POLICY CONSIDERATIONS COMPEL REJECTION OF THE SWBT PROPOSAL

With respect to pricing flexibility issues, the Commission should proceed by rulemaking rather than by *ad hoc* adjudication. It is well established that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."²⁴ However, it is equally well recognized that, in order to promote uniformity and consistency in regulation, issues with broad applicability should be resolved through general rulemaking proceeding, and not through *ad hoc* decision-making.²⁵ A general rule relieves the Commission from "restudy[ing] the entire problem *de novo* and reconsider[ing] policy every time it receives an application for waiver of the rule."²⁶

The Supreme Court has stated that there is a recognized distinction in administrative law between the formulation of "policy-type rules or standards" and

²⁴ *Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

²⁵ See, e.g., *WAIT Radio v. Federal Communications Comm'n*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. den.*, 409 U.S. 1027 (1972) (stating that "evisceration of a rule by waivers" need not be tolerated by an agency.)

²⁶ *Id.* at 1157.

"proceedings designed to adjudicate disputed facts in particular cases."²⁷ In *Securities and Exchange Comm'n v. Chenery*, the Supreme Court elucidated the distinction between adjudication and rulemaking, stating that:

problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant, general rule . . . The problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.²⁸

In the instant case, however, the Commission already has established relevant, general rules regarding LEC pricing flexibility. SWBT's proposals with respect to pricing flexibility are not so "specialized" or "varying in nature" as to be "impossible of capture within the boundaries of" the general pricing flexibility rules that the Commission intends to address in its review of the Price Caps Rules. The Supreme Court in *National Labor Relations Bd v. Bell Aerospace Co.* also recognized that there may be some instances where reliance on adjudication rather than rulemaking would amount to an abuse of discretion.²⁹

As the Supreme Court has recognized, unlike adjudication, which is binding only on the parties to the particular proceeding, "a valid exercise of the rule-making power is

²⁷ *United States v. Florida East Coast Ry.*, 410 U.S. 224, 245 (1973).

²⁸ 332 U.S. 194, 202-203. See also *National Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974).

²⁹ 416 U.S. 267, 294.

addressed to and sets a standard of conduct for all to whom its terms apply."³⁰ Such a standard is imperative for the significant issue of pricing flexibility. The Commission must determine the complex issue of pricing flexibility in the context of a rulemaking, because the issue of LEC pricing flexibility is an important policy issue that must be resolved on an industry-wide basis in order to avoid a balkanized regulatory pricing regime in which each LEC institutes its own version of pricing flexibility. Addressing this issue within the context of a rulemaking proceeding is particularly important, in order to avoid both a diminishing of the likelihood that new competitive entrants will enter into certain service areas, and a loss of continued competition from existing alternative carriers.

Addressing an issue of such significance through an *ad hoc* waiver process is wholly inadequate and would not serve the public interest because such a limited approach would fail to ensure that all relevant factors are considered. Moreover, this *ad hoc* approach would place a heavy burden on the Commission and all interested parties by requiring the continuous expenditure of limited resources on multiple proceedings. As well, it is quite clear that the ICB pricing for RFPs proposed in SWBT's Tariff is largely unenforceable on an *ad hoc* basis.

Finally, to determine pricing flexibility issues for LECs in the context of SWBT's Transmittals Nos. 2433 and 2449 would unduly prejudice pricing flexibility issues that

³⁰ *Columbia Broadcasting Sys. v. United States*, 316 U.S. 407, 418 (1942).

the Commission undoubtedly will submit for comment in its upcoming review of the LEC price cap rules. Therefore, it is more appropriate for the Commission to address the issue of pricing flexibility in the context of its pending rulemaking proceeding regarding amending the price cap rules.³¹ A grant of SWBT's proposed tariff by *ad hoc* adjudication would be inconsistent with the public interest and should be denied.

VI. CONCLUSION


As discussed above, SWBT's proposal to engage in ICB pricing in response to RFPs would result in unjustified and unlawfully discriminatory rates, and would otherwise violate the Communications Act and the Commission's rules. This practice of ICB pricing would unduly harm the public interest by stifling competition from alternative vendors and reducing the likelihood of attracting new competitive

³¹ *Commission Proposes LEC Price Cap Changes To Adopt To and Encourage Local Exchange Competition*, CC Docket Nos. 94-1, 93-124, 93-197, FCC News, Sept. 14, 1995, at 1.

entrants in certain service areas. Therefore, MFS respectfully requests that the Commission reject SWBT's proposals to permit ICB pricing in response to RFPs.

Respectfully submitted,

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Dated: September 25, 1995

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September 1995, copies of the foregoing MFS COMMUNICATIONS COMPANY, INC. OPPOSITION TO SOUTHWESTERN BELL DIRECT CASE were sent via Messenger* or via First-Class mail, U.S. postage prepaid, to the persons on the attached service list.



Sonja L. Sykes-Minor